IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 8TH JANUARY 2007 / 18TH POUSHA 1928

MFA.No. 550 of 2002()

OP(MV).498/1997 of MOTOR ACCIDENT CLAIMS TRIBUNAL, ALAPPUZHA
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APPELLANT: 3RD RESPONDENT

THE NATIONAL INSURANCE COMPANY LTD.,
ALAPPUZHA BRANCH,REPRESENTED BY ITS
ADMINISTRATIVE OFFICER,MOTOR THIRD PARTY CLAIMS
SECTION,AJAY VIHAR,M.G.ROAD,ERNAKULAM.

BY ADV. SRI.LAL GEORGE

RESPONDENTS: PETITIONERS & RESPONDENTS 1 &2
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1. KOMALAVALLY AMMA W/O.LATE VIJAYAKUMARAN NAIR,PONNATHE PARAMBATH,CHERUVARANAM, MUTTATHIPARAMBU,CHERTHALA.
2. VINETHA D/O.KOMALAVALLY AMMA, PONNATHE PARAMBATH,CHERUVARANAM, MUTATHIPARAMBU,CHERTHALA,MINOR,REPRESENTED BY HER MOTHER,KOMALAVALLY AMMA
3. VISHNU S/O.LATEVIJAYAKUMARAN NAIR, PONNATHE PARAMBATH,CHERUVARANAM,MUTTATHIPARAMBU, CHERTHALA,MINOR,REPRESENTED BY HIS MOTHER KOMALAVALLY AMMA
4. JAYAKRISHNAN,MANAGING PARTNER, HOTEL AMBADI,THODUPUZHA.
5. THE UNITED INDIA INSURANCE CO.LTD., REPRESENTED BY THE BRANCH MANAGER,ALAPPUZHA

R5 BY ADV. SMT.NARAYANIKUTTY CHETTOOR
R4 BY ADV. SRI.JOSE THETTAYIL
R1 TO R3 BY ADVS. SRI.G.B.PANICKER
SRI.C.V.MANUVILSAN
SRI.G.SUDHEER (THURAVOOR)
SRI.T.K.SUJITH
SRI.P.C.ANIL KUMAR

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 08/01/2007, THE COURT ON 08/01/2007 DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN & M.N. KRISHNAN, JJ.

M.F.A. No 550 of 2002

Dated: 8th January 2007

JUDGMENT

Radhakrishnan, J.

This appeal is preferred by the Insurance Company, third respondent in O.P. (M.V) No 498 of 1997 of the M.A.C. Tribunal, Alappuzha. Respondents 1 to 3 are the legal heirs of Vijayakumaran Nair who died in an accident which occurred on 11.03.1997. Deceased was driving a scooter bearing registration number KL-6/567 through Alappuzha - Ernakulam National Highway. When he reached at Maithara a cyclist tried to cross the road without any signal and the deceased tried to avoid the accident. By doing so he fell down and was taken to K.V.M. Hospital where he succumbed to the injuries on 15.3.1997. Claim petition was preferred by the wife and children under Section 163A of the Motor Vehicles Act claiming a total compensation of Rs 4 lakhs. The Tribunal after considering the entire matter awarded a total compensation of Rs 2,39,000/-. It was also noticed that the accident had occurred during the course of

the employment of the deceased with the fourth respondent herein and the fourth respondent was vicariously liable for the act of the employee, the deceased. Additional third respondent, appellant herein had admitted the policy and it was held that the third respondent is liable to indemnify the owner of the vehicle. Insurance Company aggrieved by the order of the Tribunal has filed this appeal.

2. Sri Lal George, counsel for the Insurance Company submitted that the Tribunal was not justified in passing the award under section 163A of the Motor Vehicles Act since the deceased died due to his own negligence and without the intervention of any other vehicle. Counsel submitted that since deceased himself was negligent Insurance Company is not liable to indemnify the owner. Counsel further submitted that no other vehicle was involved in the accident and the accident was occurred due to the negligent driving of the scooter by the deceased and that the claimants had failed to plead and establish that the death was occurred not due to any wrongful act or negligence on the part of the deceased. In support of his contention, counsel placed considerable reliance on the decision of a Division Bench of the Karnataka High Court in Appaji v. M.Krishna and another (2004 ACJ 1289). Counsel also referred to

Section 163-A amended as per Act 54 of 1994 and pointed out that when the driver himself is negligent the owner of the vehicle is not liable to compensate him and the Insurance Company cannot be called upon to indemnify the owner.

3. Counsel appearing for the respondents - claimants submitted that the point has already been covered by the Full Bench decision of this court in National Insurance Company Ltd v. Malathi C. Salian (2003 (3) KLT 460). Reference was also made to the Division Bench decision of this court in New India Assurance Co. Ltd v. Parameswaran (2005 (4) KLT 343). The Full Bench in Malathi C. Salian's case, supra considered the scope of Section 163A and held as follows:

> "The liability to pay compensation under Section 163A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an enquiry under Section 163A. Section 163A does not make any provision for apportionment of the liability. If the owner of the vehicle or the insurance company is permitted to prove contributory negligence or default or wrongful act on the part of the victim of claimants naturally the claimants will have to lead evidence which would defeat the object and purpose of Section 163A. Legislature never wanted the claimant to plead or establish negligence on the part of the owner or the driver. Once it is established that death or disablement occurred during the course of the user of the vehicle and the vehicle is insured the insurance company or the owner, as the

> case may be, shall be liable to pay the compensation. This is a statutory obligation."

We are in this case not called upon to examine the question as to whether the Insurance Company is obliged to indemnify the owner of the vehicle in an accident which occurred due to the negligent act of the owner himself. Question that has come up for consideration in this case is whether in a claim under Section 163-A the claimants need plead and establish the driver was not negligent. The Karnataka High Court in Appaji's case, supra was dealing with a claim relating to the death of the owner of the vehicle who was negligent. The court held that Section 163-A no doubt bring about a significant change in the legal position as regards the obligation to prove fault is concerned, but the change is not so drastic as to make even a tort feasor entitled to claim compensation for his own act of rashness, negligence or imprudence. We need not examine the correctness or otherwise of that judgment in this case because in the instant case the vehicle was driven by the driver in the course of his employment and not by the owner. So far as the present case is concerned, in our opinion, the dictum laid down by the Full Bench in Malathi C.Salian's case would squarely apply. In Parameswaran's

case, supra the Division Bench has also reiterated that the question of negligence need not be considered in a claim under Section 163-A. In that case driver of the jeep died in a motor accident and the court took the view that the claimant need not prove or establish that death or permanent disablement was not due to the wrongful act or negligent act of the driver of the vehicle.

4. We may however refer to the judgment of the apex court in Deepal Girishbhai Soni v. United India Insurance Co. Ltd. (2004(2) KLT 395) wherein the court after holding that the claimant cannot pursue his remedies under Sections 163A and 166 simultaneously, took the view that Section 163-A covers cases where even negligence is on the part of the victim. The court held as follows:

> "In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, which goes to show that the Parliament intended to insert a non obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of."
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> (emphasis supplied)

In the present case the vehicle was driven by the deceased during the course of his employment and hence the claimant need not plead and establish that the driver was not negligent. The question as to who is at fault is immaterial for an enquiry under Section 163A. In view of the above mentioned circumstances we find no merit in the appeal preferred by the Insurance Company and the same would stand dismissed.

C.M.P. No 3237 of 2002 is also dismissed.

Sd/-

(K.S. RADHAKRISHNAN,JUDGE)

Sd/-
(M.N. KRISHNAN, JUDGE)

08/01/2007
en/

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